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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STEPHEN L. USTRAK,

Petitioner,

vs.

JAMES W. FAIRMAN,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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EXPLANATORY STATEMENT

Reproduced herein are the two opinions entered by the District Court in this cause, which opinions were not reproduced in the Appendix to the Petition for a Writ of Certiorari.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 80-2249

Stephen Ustrak,
Plaintiff,

vs.

Gayle M. Franzen, et al.,
Defendants.

ORDER

This matter is currently before the court on the defendants' motion for summary judgment. The motion was filed on June 11, 1984, and pursuant to District Rule 10 the plaintiff was allowed eight days in which to file a response to the motion. However, more than thirty days have now passed and yet the plaintiff has not filed a response to the defendants' motion. Consequently, the court will rule on the defendants' motion without the benefit of a written argument by the plaintiff. The parties have consented to proceed before a United States Magistrate.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether summary judgment is proper, a courm ordinarily must view the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. *Rose v. Bridgeport Brass Co.*, 487 F.2d 804, 808 (7th Cir. 1973).

In their motion, the defendants seek summary judgment as to all counts contained in the plaintiff's complaint. In Count I the

plaintiff alleges that the defendants' denied the plaintiff his right to call witnesses at an October 18, 1979, Adjustment Committee hearing; moreover, the defendants denied the plaintiff his right to "an expeditious administrative review." The Adjustment Committee found the plaintiff guilty of the charges against him and demoted him to "C" grade. As a result of the time spent in "C" grade, the plaintiff claims that he was denied a transfer to a minimum security unit.

In Count II the plaintiff claims he received a disciplinary report for stealing food from the kitchen in which he worked. The Adjustment Committee found the plaintiff guilty of the charge, and the plaintiff received a disciplinary job transfer. The plaintiff also claims that on a prior occasion three black inmates who also worked in the inmate kitchen received disciplinary reports and were punished for the same infraction as the plaintiff; however, the three black inmates lost one month commissary privileges but were not removed from their jobs. The plaintiff claims that the aforementioned practice constitutes reverse discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

In Count III the plaintiff claims that on July 1, 1980, he received a disciplinary report for possession of contraband and was found guilty of the charge. As a result, the plaintiff lost one month of commissary privileges. The plaintiff states that he properly requested that his cellmate be called as a witness, but the Adjustment Committee improperly denied his request. Moreover, the plaintiff contends that he is a victim of racial discrimination because his cellmate, a black, was not charged with possession of contraband.

In Count IV the plaintiff alleges that in June, 1979, he applied for the job of law clerk in the prison law library but was denied the job simply because of his race. Finally, in Count V the plaintiff complaints [sic] that on October 10, 1980, he wrote a letter to the defendant Fairman complaining about certain cor-

rections officers, and the letter apparently contained numerous disrespectful and derogatory remarks. As a result, on October 25, 1980, a Captain Hewitt wrote a disciplinary report on the plaintiff because of the improper language contained in the letter. Subsequently, an Adjustment Committee found the plaintiff guilty and sentenced him to fifteen days in segregation and demoted the plaintiff to "C" grade for thirty days. Ultimately, the defendant Fairman ordered that the disciplinary report be expunged from the plaintiff's record because it was written after the time allowed by the Department of Corrections' Administrative Regulations. The plaintiff claims that his First Amendment right to correspond with Warden Fairman was violated because of the disciplinary action taken against him.

Denial of Witnesses

The right to call witnesses is basic to a fair hearing. *Wolff v. McDonnell,* 418 U.S. 539 (1974); *Redding v. Fairman,* 717 F.2d 1105 (7th Cir. 1983). In *Wolff,* the United States Supreme Court explained:

> We are also of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. Ordinarily, the right to present evidence is basic to a fair hearing; but the unrestricted right to call witnesses from the prison population carries obvious potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution.
>
> . . . .
>
> It may be that an individual threatened with serious sanctions would normally be entitled to present witnesses and relevant documentary evidence; but here we must balance the inmate's interest in avoiding loss of good time

> against the needs of the prison, and some amount of flexibility and accommodation is required. Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limite [sic] access to other inmates to collect statements or to compile other documentary evidence.

418 U.S. at 566. Moreover, in *Hayes v. Walker (Hayes I)*, 555 F.2d 625 (7th Cir.), *cert. denied*, 434 U.S. 959 (1977), the Seventh Circuit recognized that the *Wolff* court declined to require a formal statement of reasons when requests for witnesses are denied. However, the court stated that some support for denial of witnesses should appear in the administrative record; without such a record judicial review would be meaningless. *Id.* at 630.

Here, the plaintiff requested that his cellmate, Ronald Stokes, be present at the plaintiff's October 1, 1979, disciplinary hearing. The plaintiff also submitted a letter from Ronald Stokes stating that the plaintiff had permission to accept Mr. Stokes' mail. *See* Defendants' Exhibit A, pp. 27-38. This letter contained the same information as Mr. Stokes' testimony before the Adjustment Committee would have revealed. The plaintiff states that he requested no other witnesses. Defendants' Exhibit B, p. 33.

From the facts contained in the plaintiff's deposition, it is clear that Ronald Stokes' live testimony would not have added to the plaintiff's Adjustment Committee hearing. In fact, the testimony would have been cumulative. Consequently, the court concludes that the Adjustment Committee's decision not to call Ronald Stokes as a witness as the October, 1979, Adjustment Committee hearing did not violate the plaintiff's limited right to call witnesses on his behalf. *Cf. Wolff*, 418 U.S. at 556; *Redding*, 717 F.2d at 1114. The defendants' motion for summary judgment is allowed as to the denial of witnesses issue. *See* Fed. R. Civ. P. 56(c).

Equal Protection Violation

In Count II, the plaintiff claims that he was punished for stealing food from the prison kitchen in which he worked. Moreover, the plaintiff claims that on a prior occasion three black inmates who also worked in the kitchen received disciplinary reports for stealing food but received punishments which were less severe than the plaintiff's punishment.

In *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 265 (1976), the United States Supreme Court held that "proof of a racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." The essence of equal protection is that persons similarly situated with respect to challenged governmental action be treated similarly. *Reed v. Reed,* 404 U.S. 71 (1971); *Dorsey v. Solomon,* 435 F. Supp. 725 (D. Md. 1977).

In the instant action, the plaintiff complains that he, a white inmate, and three black inmates at the Pontiac Correctional Center, each received disciplinary reports for stealing food from the inmate kitchen. However, the black inmates were not punished as severely as the plaintiff. Specifically, the plaintiff complains that he was transferred to another prison job while the black inmates were allowed to keep their jobs. Since the plaintiff alleges, and presumably can prove, that he is a member of a suspect class, summary judgment is appropriate as to the plaintiff [sic] equal protection claim only if the defendants can show a compelling state interest in treating the plaintiff differently than it [sic] treated the black inmates. *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976). On the facts currently before the court, summary judgment is not appropriate. *See* Fed. R. Civ. P. 56(c).

Regarding Counts III and IV of the plaintiff's complaint, the court must also conclude that summary judgment is not appropriate. In Counts III and IV, the plaintiff charges that certain actions by the defendants violated the plaintiff's rights as

guaranteed under the Equal Protection Clause of the Fourteenth Amendment. After reviewing the documents filed in this case the court must conclude that the defendants cannot establish, as a matter of law, that the defendants had a compelling state interest in treating the plaintiff differently than it [sic] treated the black inmates at Pontiac. *Cf. Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976).

Regarding Count V of the plaintiff's complaint, the court concludes that the defendants' motion for summary judgment is appropriate. In Count V the plaintiff charges that his First Amendment right to correspond with Warden Fairman was violated because the plaintiff was issued a disciplinary report for writing the Warden. However, the plaintiff received a disciplinary report because of the improper language contained in his letter.

A prisoner's First Amendment rights are not absolute. They are restricted by incarceration; a prisoner retains those First Amendment rights which are not inconsistent with legitimate penal objectives. *Pell v. Procunier,* 417 U.S. 817 (1974). Under Administrative Regulation 804, cursing and other derogatory comments are a violation of prison rules. The regulation does not distinguish between the written word and the spoken word. *See* Ad. Reg. 804. The defendants had a legitimate penal objective in writing a disciplinary report against the plaintiff; consequently, summary judgment is appropriate as to this issue. *Cf.* Fed. R. Civ. P. 56(c).

Accordingly, IT IS ORDERED that the defendants' motion for summary judgment be, and hereby is, allowed in part and denied in part. The motion is allowed insofar as it seeks judgment as to Counts I and V of the plaintiff's complaint. The motion is denied insofar as it seeks judgment as to Counts II, III and IV of the plaintiff's complaint.

IT IS FURTHER ORDERED that this matter be set for a status hearing pursuant to Fed. R. Civ. P. 16 by telephone conference call on Friday, August 10, 1984, at 10:00 a.m.

ENTER this 23rd day of July, 1984.

/s/ Charles H. Evans
United States Magistrate

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 80-2249

Stephen Ustrak,
Plaintiff,

vs.

Gayle M. Franzen, et al.,
Defendants.

ORDER

This matter is currently before the court on the plaintiff's motion for reconsideration of a partial grant of summary judgment to the defendants. *See* Court Order of July 23, 1984. Pursuant to District Rule 10 the defendants are allowed eight (8) days in which to file a response to the motion. However, the court will rule on the plaintiff's motion without the benefit of a written argument by the defendants since the court has already determined that the plaintiff's motion is without merit.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether summary judgment is proper, a court ordinarily must view the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. *Rose v. Bridgeport Brass Co.*, 487 F.2d 804, 808 (7th Cir. 1973).

In their [sic] motion the plaintiff seeks reconsideration of the grant of summary judgment as to Counts 1 and 5 [sic] in the plaintiff's amended complaint. In Count 1 [sic] the plaintiff alleged that the defendants denied the plaintiff his right to call

witnesses at an October 18, 1979, Adjustment Committee hearing; moreover, the defendants denied the plaintiff his right to "an expeditious administrative review." In Count 5 [sic] the plaintiff complains that he wrote a letter to the defendant Fairman complaining about certain corrections officers and as a result a disciplinary report was written on the plaintiff because of improper language contained in the letter. The plaintiff claims that his First Amendment right to correspond with Warden Fairman was violated because of the disciplinary action taken against him.

DENIAL OF WITNESSES

The plaintiff first contends the defendants' failure to call his cellmate Ronald Stokes, a witness requested by the plaintiff at the Adjustment Committee hearing, violated his right to due process. However, the plaintiff also submitted a letter from Ronald Stokes stating that the plaintiff had permission to accept Mr. Stokes' mail. *See* Defendants' Exhibit A, pages 27-38. This letter contained the same information as Mr. Stokes' testimony before the Adjustment Committee would have revealed. The plaintiff states that he requested no other witnesses. *See* Defendants' Exhibit B, page 33.

In *Wolff v. McDonnell,* 418 U.S. 539 (1974), the United States Supreme Court stated that "an inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." *Id.* at 566. Three potential reasons for refusing to call an inmate's witness, listed by the court in *Wolff,* are "irrelevance, lack of necessity, or hazards presented in individual cases." *Id.*

In the present case the Adjustment Committee considered the letter from Ronald Stokes which reflected his version of the incident. It is clear that Ronald Stokes' live testimony would not

have added to the plaintiff's Adjustment Committee hearing. Further, the plaintiff has failed to show that any genuine issue of facts remain concerning the necessity of calling Ronald Stokes as a witness.

The plaintiff's contention that the plaintiff [sic] is attempting to carve out a new exception to an inmate's right to call witnesses at his disciplinary hearing for "cumulative testimony" is without merit. As stated previously, one reason for refusing to call an inmate's witness listed by the court in *Wolff* is the *lack of necessity*. 418 U.S. at 566. The court can think of no better example of unnecessary evidence than the needless presentation of cumulative evidence. *See generally* Fed. R. Civ. P. 403 [sic]. Consequently, the court concludes that the Adjustment Committee's decision not to call Ronald Stokes as a witness at the October 1979 Adjustment Committee hearing did not violate the plaintiff's limited right to call witnesses on his behalf. *Cf. Wolff,* 418 U.S. at 556; *Redding v. Fairman,* 717 F.2d 1105, 1114 (7th Cir. 1983). The plaintiff's motion for reconsideration of the granting of defendants' motion for summary judgment is denied as to the denial of witnesses issues. *See* Fed. R. Civ. P. 56(c).

EXPEDITIOUS ADMINISTRATIVE REVIEW

In addition to the foregoing, Count 1 [sic] of the amended complaint alleges that subsequent to such hearings the plaintiff filed a grievance through the procedures established by the Illinois Department of Corrections for inmate grievance, and such grievance was not expeditiously processed, to-wit: such grievance was filed in October of 1979 and not acted upon until August of 1980.

The plaintiff contends that, while no constitutional right to a grievance procedure may exist, because the Illinois Department of Corrections established such procedure, a constitutional right to an expeditious resolution of such grievance was created. However, this contention is a misstatement of the law:

> The argument that the procedures established by the regulations can themselves be considered a liberty interest is analytically indefensible. We have repeatedly observed: "procedural protections or the lack thereof do not determine whether property rights exist.... Of course the existence of state procedural protections is not irrelevant to a determination of whether a substantive interest exists. A state often provides for specific procedures to ensure the realization of an apparent substantive right.... [B]ut a state created procedural right is not itself a liberty interest within the meaning of the Fourteenth Amendment, *Lombardo v. Meachum,* 548 F.2d 13, 16 (1st Cir. 1977).'

Shango v. Jurich, 681 F.2d 1091, 1100-1101 (7th Cir. 1982).

The plaintiff here cannot show that he has a protectable liberty interest in the grievance procedures set out in the Administrative Regulations. He is unable to apply for relief under 42 U.S.C. § 1983. Consequently, the plaintiff's motion to reconsider the granting of summary judgment as to this part of claim one must also be denied.

FIRST AMENDMENT RIGHT

The court finds that the plaintiff's motion to reconsider Count 5 [sic] of the Amended Complaint to be without merit. The violation alleged in the motion to reconsider is not substantiated by the facts set out in the plaintiff's amended complaint. Further, the court observes that the plaintiff did not avail himself of his right under Local Rule 10 to file a response to the defendant's original motion for summary judgment. Consequently, the plaintiff will not now be heard and the court will rule on the defendants' motion without the benefit of a written argument by the plaintiff. The plaintiff's motion for reconsideration of Count 5 [sic] of the amended complaint is hereby denied.

Accordingly, IT IS ORDERED that the plaintiff's motion for reconsideration of the order granting summary judgment to the defendant as to Counts 1 and 5 [sic] of the amended complaint be, and hereby is, denied.

ENTER this 23rd day of August, 1984.

/s/ Harold A. Baker
United States District Judge